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TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,

Petitioner,

v.

KRAFT FOOD GROUP BRANDS LLC,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICUS CURIAE* ENGINE ADVOCACY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Amicus Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization that bridges the gap between policymfrs and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship.[1] Engine conducts research, organizes events, and spearheads campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation.

Engine seeks to bring to the Court's attention relevant perspectives on the impact of this case that are not likely to be fully presented by the parties. In particular, Engine submits this brief to highlight the damage to startups, small businesses, and small entrepreneurs and innovators caused by the Federal Circuit's interpretation of the venue statute, and the importance of a proper interpretation of that statute to American innovation and the economy as a whole.

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[1] The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case addresses the proper interpretation of federal venue statutes in patent cases. This brief addresses the forum shopping and selling enabled by the Federal Circuit's erroneous interpretations of those statutes. These errors have enabled rampant forum selling and shopping, and in turn contributed to the rise of the problem of patent assertion entities (PAEs), colloquially known as "patent trolls." They are causing ongoing damage to the innovators, startups, and small businesses that are the lifeblood of the American economy. Correcting the Federal Circuit's errors and returning to the venue rules Congress mandated will do much to end that damage.

In its decision below, the Federal Circuit continued to disregard the clear language of the patent venue statute, 28 U.S.C. § 1400(b), and this Court's precedent. This departure has no basis in the law. Rather, it takes a minor statutory clarification and uses it to effectively read § 1400(b) out of the law and drastically expand the scope of appropriate venue in patent cases.

Patent plaintiffs' ability to effectively file suit wherever they choose causes harm in multiple ways. Defending a patent suit is always expensive. But doing so in a faraway district where a defendant has no presence and essentially no connection greatly increases that expense. Companies must pay out of pocket for lawyers and employees to fly, stay, and litigate, and their business must pay in even greater ways such as losing days or weeks of key employees' time that would otherwise be spent innovating or growing the business.

Worse, the largely unlimited ability of plaintiffs to select any district in which to sue has led to forum selling and forum shopping. A small number of districts offer patent plaintiff-friendly rules, procedures and jury pools, increasing the risk of defending a suit and compounding the pressure to settle. Unsurprisingly, this has resulted in the concentration of the vast majority of patent suits in those districts despite the lack of any significant connection to the defendants or indeed, to innovation generally.

The ability of patent plaintiffs to choose their preferred district (and often, with high probability, their preferred judge), has contributed heavily to the growing problem of PAEs. PAEs produce no products or services, but instead assert often weak patents against defendants—often startups and small companies—who are likely to have no choice but to settle rather than face the expense and risk of trying a case in a far-off-venue with costs, rules and jurors that place them at a known disadvantage.

The problem is far from theoretical. Over a third of the nation's patent litigation—and in particular, PAE litigation—is now pursued in front of two judges in a single district: the Eastern District of Texas. Yet only a small minority of defendants have any real presence in or connection to that district. Much of the remaining patent litigation takes place in a small handful of other districts. The Eastern District of Texas in particular exemplifies the forum shopping and forum selling problems that are facilitated by the erroneous ruling below.

This situation is causing particular harm to small entrepreneurs and innovators and, in turn, the

American economy. Startups and small businesses are responsible for the majority of net job increases in the United States, and contribute disproportionately to economic growth. But these same startups and small business are particularly vulnerable to threats of litigation—particularly litigation in an unfriendly, distant district. The cost of defending such a lawsuit is often prohibitive, and even the cost of settlement is often enough to cripple a new venture, discourage investment, or simply put a startup out of business.

By ignoring Congress's intent to limit where defendants in patent cases can properly be sued, the Federal Circuit has allowed the development of a handful of patent-friendly districts. Lawsuits by legitimate operating companies as well as PAEs in these districts impose significant costs and burdens on businesses in general, but particularly on the small innovators and entrepreneurs. Amicus therefore urges this Court to reverse the Federal Circuit's erroneously flawed venue rule, restore Congress's intended limitations on the scope of patent venue, and halt the ongoing damage caused to innovation, entrepreneurship and the economy.

ARGUMENT

I. The Federal Circuit Ignored the Plain Language of § 1400(b) and This Court's Precedent Regarding Venue in Patent Cases.

In 1948, Congress enacted 28 U.S.C. § 1400(b), establishing that patent venue is proper "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place

of business." Nearly ten years later, this Court clarified that "28 U.S.C. § 1400(b) . . . is the sole and exclusive provision controlling venue in patent infringement actions, and that it is not to be supplemented by the provisions of 28 U.S.C. § 1391(c) [which governs venue in civil actions generally]." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957). This Court has never deviated from its determination that the sole statute governing patent venue is 28 U.S.C. § 1400(b).

Thus, for decades the law was clear that corporate defendants in patent cases could only be sued where they were incorporated[2] or where they had a regular and established place of business *and* had committed acts of infringement. In 1990, however, the Federal Circuit, relying on a ministerial change to 28 U.S.C. § 1391 that modified the definition of residence from "for venue purposes" to "for purposes of venue under this chapter," abandoned this Court's longstanding venue precedent. *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990). That decision effectively rendered § 1400(b) a nullity by collapsing the requirements of venue in patent cases with the requirements of personal jurisdiction in civil cases generally. *See id.*

VE Holding dramatically expanded where defendants in patent cases can be sued. Now, the

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[2] "[T]he residence of a corporation for purposes of § 1400(b) is its place of incorporation." *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 707 n.2 (1972).

Federal Circuit's decision below perpetuates that expansion by concluding that Congress's 2011 amendments to § 1391 did not undermine *VE Holding Corp.'s* abandonment of § 1400(b) and *Fourco*. *See* J.A. at 40a.

Under the Federal Circuit's rule, patent plaintiffs remain able to sue accused infringers anywhere personal jurisdiction exists. In most patent cases, that means that a patent owner can choose from almost any judicial district in the nation. This is a far cry from the venue rule crafted by Congress in § 1400(b) and upheld by this Court in *Fourco*, a rule that limited patent suits to only where the defendant is incorporated or has a regular and established place of business and commits an act of infringement.

II. The Federal Circuit's Erroneous Rule Imposes Additional Costs and Burdens on Companies Accused of Patent Infringement, Especially Small Innovators and Entrepreneurs.

Permitting patent plaintiffs to sue alleged infringers anywhere in the country, no matter how far removed from the defendant's place of business, significantly raises the costs of defending such suits and imposes particularly heavy burdens on startups and small businesses, the engines of innovation in the American economy. Diverting valuable resources to pay added litigation costs often means that small firms and innovators are unable to cover their existing expenses, hire new employees, or launch new products. They may be forced to cancel new contracts or scale back on innovating new ideas through research and development. These limitations ripple

throughout the American economy, resulting in fewer jobs and reduced economic activity.

First, the costs of defending a patent infringement suit—even in a nearby district—are exorbitant. A study by the American Intellectual Property Law Association estimates that defense costs for suits with less than $1 million at stake filed by PAEs totaled $300,000 to the end of discovery and $500,000 to full resolution in 2015. Law Practice Mgmt. Comm., *2015 Report of the Economic Survey*, Am. Intellectual Prop. Law Ass'n, 38 (2015), http://files.ctctcdn.com/e79ee274201/b6ced6c3-d1ee-4ee7-9873-352dbe08d8fd.pdf.

Worse, though, having to defend a suit in a faraway district where a firm has no branch office, conducts no meaningful activity, and has no other recognizable connection creates substantial added costs that go well beyond the ordinary cost of litigation. Added costs include, but are not limited to, payments for airline travel, hotel rooms, car rentals, and other incidentals for counsel, paralegals, business officers, witnesses, and other personnel. Defending in a foreign district also often requires renting local office space for the hearing or trial team, renting temporary equipment for that "war room," shipping documents and materials, and hiring additional, local counsel. These direct, out-of-pocket costs can easily reach into the tens or even hundreds of thousands of dollars.[3]

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[3] For example, even for a thinly-staffed legal team (consisting of two attorneys, one in-house counsel, one paralegal, and three company witnesses) and a

But the real cost of being forced into a distant court goes well beyond these direct expenses. Businesses, especially small ones whose few employees are critical for ongoing operations, are especially burdened by the opportunity costs of litigation in far-away districts. The extra days that key employees must spend traveling for preparation and testimony are days the employees cannot spend innovating or operating their businesses. For example, a startup that relies on the work of a founder and two engineers would likely have to completely halt its research and development while those employees traveled to and remained for some time to serve as witnesses at a hearing or trial across the country. The burden on this company is considerably greater than it would be for a lawsuit filed in its home district, as mandated by § 1400(b).

III. The Federal Circuit's Rule Has Led to Forum Shopping, Forum Selling, and the Rise of Patent Assertion Entities.

The ability to bring a patent lawsuit anywhere in the country not only imposes extra costs on companies and individuals accused of infringement. It also has caused an unprecedented and unjustified concentration of patent cases in a few districts that would otherwise have no geographic or business connection to the party being sued. This rampant forum shopping has been exploited by PAEs, who run

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(continued)

short trial, a rough estimate of the *additional costs* of having to litigate in a distant forum is on the order of $50,000 or more.

to whichever courthouse has the friendliest rules for plaintiffs. It also has led to the appearance of forum selling in certain districts, exemplified by unseemly procedural advantages for plaintiffs and community and litigant behavior within those districts. The result is a host of burdensome and predatory litigation practices in patent suits that undermines the fairness of the patent litigation system and harms small businesses and entrepreneurs.

A. The Federal Circuit's Rule Has Resulted in an Anomalous and Nonsensical Concentration of Patent Cases in a Handful of Districts.

In 2001, before her elevation to the Federal Circuit, Judge Kimberly Moore surveyed forum shopping in patent cases. *See* Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889 (2001). Judge Moore ranked the ten districts that resolved the most patent cases between 1995 and 1999. *Id.* at 903 tbl.1. The busiest district at the time was the Central District of California, which saw 9.1% of all patent cases nationwide. *Id.* The Eastern District of Texas did not make Moore's list. *Id.*

Now fast-forward to 2015, when 43.6% of the nation's new patent cases were filed in the Eastern District of Texas. *See* Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 8 tbl.1 (2017); *see also* Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, Motherboard (May 5, 2016, 9:00 AM), http://motherboard.vice.com/read/the-small-town-judge-who-sees-a-quarter-of-the-

nations-patent-cases. In 2016, 62.6% of the nation's patent cases were filed in only five districts. Brian Howard, *Q4 Litigation Update*, Lex Machina, fig.4 (Jan. 12, 2017), https://lexmachina.com/q4-litigation-update/. Of these 62.6%, only 4.2% were in the Northern District of California, home to Silicon Valley and some of the largest and most innovative American companies. *Id.* Furthermore, only 6.4% and 5.5% were filed in the Central District of California and the Northern District of Illinois, respectively. *Id.*

Delaware's share was somewhat larger, at 10.1%, *id.*, but this is to be expected because Delaware is the state of incorporation for 50% of all public companies in the United States, and 60% of the Fortune 500. *See* Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 L. & Contemp. Probs. 135, 135 (2004). But the Eastern District of Texas, which is not a center of either incorporation nor innovation, received 36.4% of all 2016 patent case filings. Howard, *supra*, at fig.4. Texas' technology centers of Houston, Austin, and Dallas are not in the Eastern District and its hotspots for patent litigation, Marshall and Tyler.[4]

There are not significant numbers of inventors, original patent assignees, or accused infringers based in the Eastern District. *See id.* at 10-11 (reporting

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[4] The only part of the district that contains any part of these technology centers, the Sherman Division, hears just a tiny proportion of the district's patent cases. *Id.* at 7 n.26 (reporting that from 2014 to mid-2016, the Sherman Division presided over 44 of the 4,736 patent cases filed in the Eastern District).

that, from 2014 to mid-2016, only 14.8% of patent cases in the Eastern District involved an inventor identified by the patent as residing in the district, *or* an original assignee identified in the same way, *or* a first-named defendant with a branch office in the district; in the Northern District of California, this number was 87.6%). Nevertheless, the Eastern District has become emblematic of the rampant patent forum shopping encouraged by the Federal Circuit's rejection of § 1400(b). More patent cases were filed in the Eastern District than in any other district court in eight of the past ten years,[5] including the last six years. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 249 tbl.1 (2016) (reporting case count by district for 2007 through 2014); Love & Yoon, *supra*, at 8 tbl.1 (reporting the same for 2015); Howard, *supra*, at fig.4 (reporting the same for 2016). From 2009 to 2015, the proportional share of patent cases heard by the district has increased from 9% of all patent cases in 2009, Klerman & Reilly, *supra*, at 249 tbl.1, to 43.6% in 2015. Love & Yoon, *supra*, at 8 tbl.1.

Moreover, since 2014 over *one fourth* of the nation's patent cases were heard by *a single* judge, Judge Rodney Gilstrap of the Eastern District. Love & Yoon, *supra*, at 6. This is more than the number of patent cases filed in California, New York, and Florida combined. *Id.* (reporting 3,166 patent suits

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[5] In the two years where the Eastern District of Texas was not the most popular forum, it was the second most popular.

before Judge Gilstrap, and 2,656 in California, Florida, and New York, combined).

PAEs are responsible for the massive numbers of patent cases in this district, in spite of the absence of actual inventors or infringers. From 2014 to mid-2016, 93.9% of patent cases brought in the Eastern District of Texas were filed by PAEs, well above the nationwide average of 62.9%. *Id.* at 9 tbl.2. This happens because forum shopping is so easy and widespread under the Federal Circuit's venue rule. PAEs can choose the most favorable district in which to file their cases, and they overwhelmingly choose the Eastern District of Texas.

B. The Eastern District of Texas Exemplifies the Cycle of Forum Shopping, Forum Selling and Burdensome Litigation Practices That Results from the Federal Circuit's Venue Rule.

The burdens on defendants created by the Federal Circuit's rule are especially pronounced in the Eastern District of Texas. As the statistics described above demonstrate, plaintiffs, and particularly PAEs, choose the District in large numbers. This forum shopping goes hand in hand with a range of plaintiff-friendly actions in the District, including idiosyncratic procedures that favor plaintiffs and help PAEs to force extortionate settlements, and notably higher success rates for plaintiffs in settlement and at trial.

i. The Eastern District of Texas Exhibits Abnormal Forum-Selling and Litigant Gamesmanship That Undermine the Appearance of Integrity of the Patent Litigation System.

The outsized concentration of patent cases in the Eastern District is accompanied by various efforts to "sell" the District as a favorable haven for patent owners, and to proactively bolster the reputation of repeat litigants in the district.[6] Such actions are highly abnormal and disturbing when viewed from the perspective of any other district. They serve to undermine at least the appearance of fairness and integrity of the courts and the patent litigation system.

It is common knowledge that the Eastern District and its courts in Marshall and Tyler have become notorious as the center of PAE activity and of patent suits generally. This notoriety is reflected in a seemingly endless stream of popular press and law review articles over the last ten years analyzing the phenomenon. It may have reached its peak of public awareness in 2015, with an extended critique by well-known satirist John Oliver on his HBO show *Last Week Tonight*. *See* LastWeekTonight, *Patents: Last Week Tonight with John Oliver (HBO)*, YouTube, 7:10-8:37 (Apr. 19, 2015) https://www.youtube.com/watch?v=3bxcc3SM_KA (characterizing the PAE

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[6] For an extensive analysis of forum selling in the Eastern District of Texas, *see* Klerman & Reilly, *supra*, at 250-77.

problem as a result of the plaintiff-friendly nature of judges and juries in the Eastern District, and noting how "big companies are having to go to absurd lengths to pander to the people of Marshall, Texas").[7] The district's notoriety even extended to oral arguments in this Court in March of 2006, where Justice Scalia quipped about "a problem with Marshall, Texas" and "renegade jurisdictions." Transcript of Oral Argument at 10-11, *eBay Inc. v. MercExchange LLC*, 547 U.S. 388 (2006) (No. 05-130).

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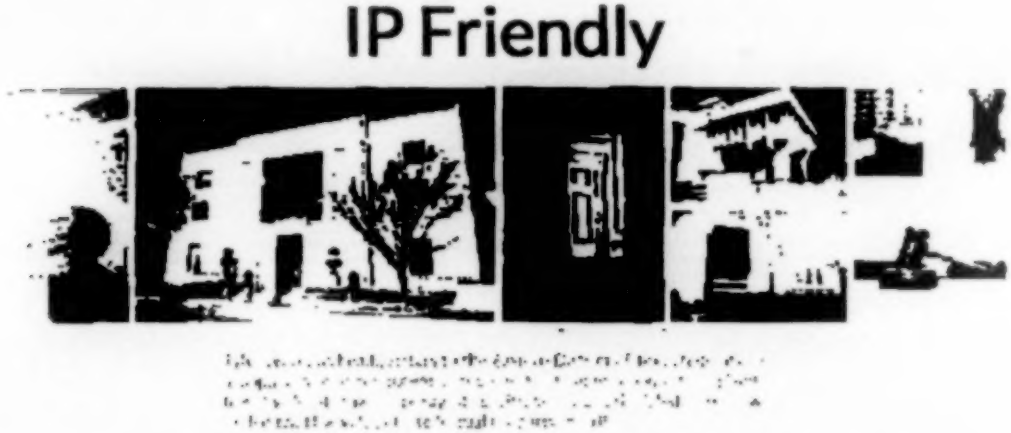
[7] Similarly, an episode of the popular public radio program *This American Life* detailed the practices of PAEs in Marshall in an episode titled, "When Patents Attack!" *See 441: When Patents Attack!*, This Am. Life (Jul. 22, 2011), https://www.thisamericanlife.org/radio-archives/episode/441/transcript. The episode investigated an office building on the town's main square, two doors down from the federal courthouse, that reportedly was "ground zero" for many companies that brought patent suits in Marshall. *Id.* The building showed no sign of activity inside. *Id.* ("All the . . . doors looked exactly the same: locked, name plates over the door, no light coming out. It was a corridor of silent, empty offices.") A local attorney stated that he did know of any employees working inside, and that he doubted the offices were ever occupied. *Id.*; *see also*, Austin Meyer, *The Patent Scam*, 15:55-16:00 http://www.thepatentscam.com/ (describing a similar search for PAEs in the Eastern District that revealed only dozens of empty offices, "fake addresses[,] and abandoned office buildings").

One prominent example of forum selling in the Eastern District that underlies this notoriety is a website titled "Tyler4Tech," created by a group of local businesses and organizations to encourage technology companies to "[l]ocate your tech company to Tyler[,] Texas." Tyler4Tech, *Tyler4Tech*, http://tyler4tech.com/index.html (last visited Jan. 31, 2017), *archived at* https://perma.cc/E6T8-JAST. One of the four prominent reasons to locate in Tyler trumpeted on the site's front page is that the area is "IP Friendly." One click leads to a sub-page, shown in the image below, that features the title "IP Friendly" in large red letters followed by images of the federal courthouse, a law-firm office and various patent- and law-related items. *See* Tyler4Tech, *IP Friendly*, http://tyler4tech.com/ipfriendly.html (last visited Jan. 31, 2017), *archived at* https://perma.cc/JT7C-GVVL.



The page explains that Tyler is "a popular venue for patent cases due to its judicial expertise, plaintiff-friendly local rules, speedy dispositions, and principled jurors who understand the value of Intellectual Property." *Id.* The page also touts that Tyler has "a network of local attorneys skilled in patent litigation and IP matters." *Id.* It concludes

with the assurance that local, "principled jurors in East Texas show a propensity for understanding the true value of Intellectual Property and have awarded IP owners appropriately," and then lists seven large jury verdicts in the district against major technology companies including Samsung, Apple, Microsoft, Dell, and Toshiba, *totaling over $1 billion. Id.*

These promotional efforts are not surprising given that the surge in patent litigation in Marshall and Tyler has become an important part of the broader economy of the area. *See* Klerman & Reilly, *supra*, at 273-74 (noting that many area businesses, including legal office space, hotels, and restaurants, were started or expanded in large part based on the litigation boom, and that an end to the boom would "devastate" the local economy, with "dire financial consequences for many local lawyers and citizens"); *see also* Loren Steffy, *Patently Unfair*, Texas Monthly (Oct. 2014), http://www.texasmonthly.com/politics/patently-unfair/ (recounting the history of Marshall becoming the center of patent litigation and noting that trials there have "brought prosperity to the town").

The absurdity of this situation is vividly reflected in the lengths to which patent litigants in the Eastern District find themselves compelled to go in order to even out the playing field. A prominent example is Samsung, a Korean electronics giant that has been sued for patent infringement in the Eastern District of Texas dozens of times over the last ten years. As the lawsuits have proliferated, Samsung has, quite understandably, embarked on a host of highly visible charitable and civic activities in both Marshall and Tyler.

For example, for a number of recent years, Samsung sponsored an outdoor ice-skating rink, prominently labeled with the Samsung name and corporate logo (see image below), in the downtown square of Marshall just steps from the federal courthouse where patent cases are heard. *See* Joe Mullin, *Patent Troll Claims to Own Bluetooth, Scores $15.7M Verdict Against Samsung*, Ars Technica (Feb. 17, 2015), https://arstechnica.com/tech-policy/2015/02/patent-troll-claims-to-own-bluetooth-scores-15-7m-verdict-against-samsung/; *see also* LastWeekTonight, *supra*, at 7:52-8:22 (displaying the Samsung ice rink and describing the firm's community contributions).

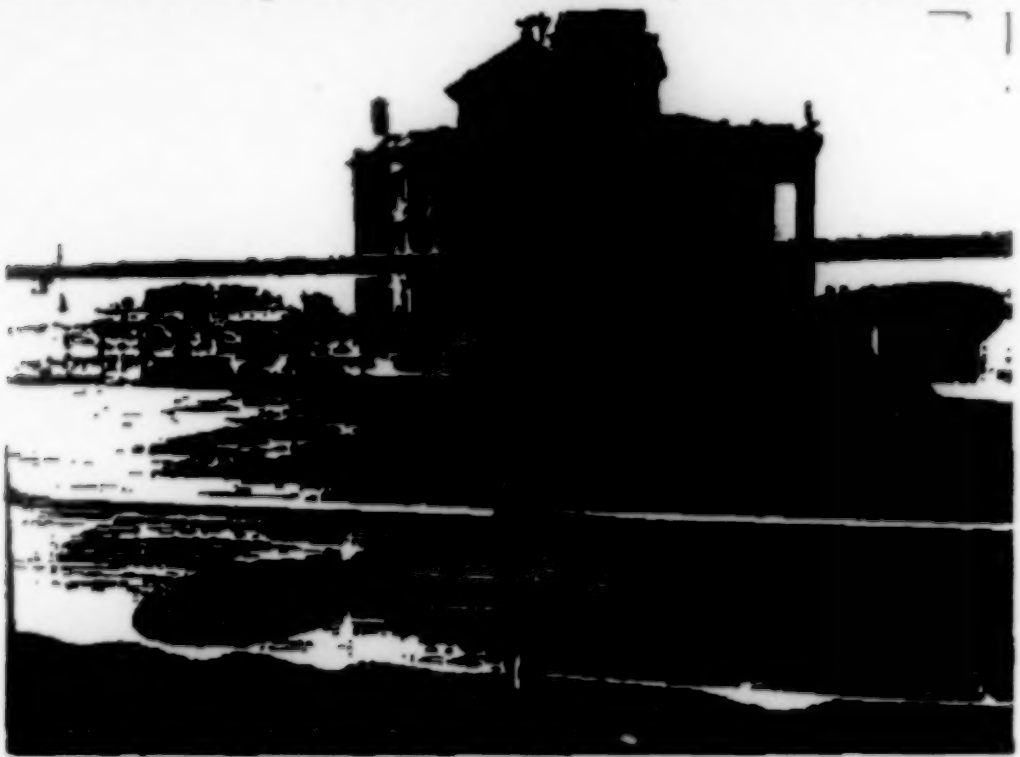


Image from Mullin, *Patent Troll, supra*.

Samsung also reportedly has sponsored the Samsung Holiday Celebration Show, which opens the Marshall Wonderland of Lights Festival, *see Wonderland of Lights Festival Underway in Marshall*, My East Texas (Dec. 9, 2013),

http://myetx.com/wonderland-of-lights-festival-underway-in-marshall/, as well as the Samsung Stagecoach Days held in Marshall each May. *See* Zusha Elinson, *IP Trial Strategy: Buying Tivo's Bull*, The Recorder (June 25, 2009), http://www.therecorder.com/id=1202431746710/IP-Trial-Strategy-Buying-Tivos-Bull.

In addition to the Samsung Ice Rink, the Samsung Holiday Show, and the Samsung Stagecoach Days, the company reportedly also funded $50,000 in college scholarships for high school students in Marshall and Tyler in 2014. *See 7 East Texans Awarded More than $50,0000 from Samsung*, The Marshall News Messenger (May 16, 2014), https://www.marshallnewsmessenger.com/news/2014/may/16/7-east-texans-awarded-more-than-500000-from-samsun/. These scholarships were presented in the form of "photograph-worthy giant checks with a Samsung logo on them," images of which were often published in the local newspaper. Mullin, *Patent Troll*, *supra*. This built on Samsung's donation in 2012 of $25,000 in scholarship money to Marshall high school students. *See Some Good News to Ponder Before Thanksgiving*, The Marshall News Messenger (Nov. 20, 2012), https://www.marshallnewsmessenger.com/news/2012/nov/20/some-good-news-to-ponder-before-thanksgiving/.

Samsung did even more in 2014, making donations to a host of other local organizations in Tyler and Marshall, including the East Texas Food Bank, the Boys and Girls Club of East Texas, Marshall Public Library, Tyler Public Library, and the Marshall and Tyler school districts. *See 7 East*

Texans Awarded More than $50,0000 from Samsung, supra. The Marshall newspaper, reporting on the 2012 scholarships, described Samsung as "the South Korean company that has fortunately become *Marshall's benefactor*." *Some Good News to Ponder Before Thanksgiving, supra* (emphasis added).

It would be difficult to fault Samsung for responding to a flood of patent suits in the Eastern District of Texas by seeking to become a prominent benefactor to the Marshall and Tyler communities. Other litigants have taken similar steps. One example is TiVo, a San Carlos, California tech firm. In 2006, when TiVo was in the middle of a major patent trial in Marshall (where it was the plaintiff), the company reportedly bought the Grand Champion steer at auction during Marshall's Farm City Week for a then-record-setting price of $10,000. Soon afterward, following a winning verdict in its case, TiVo (which subsequently was both a defendant and plaintiff in several patent suits the Eastern District) reportedly took out a large advertisement in the *Marshall News Messenger* touting its purchase. *See* Elinson, *supra.* Other technology companies facing patent trials in Marshall, including Medtronic and OPTi, have also reportedly bought steers at Farm City Week auctions in Marshall. *Id.*

There is nothing inherently improper about these attempts by the local community to capitalize on the wave of patent litigation, or by litigants to establish positive reputations in the small towns in which they must repeatedly defend patent lawsuits. Those efforts, however, serve as unmistakable indicators that the Federal Circuit's sue-anywhere venue rule is leading to anomalous and undesirable effects that

call into question the fairness and integrity of patent litigation generally. And these effects are enabled by a range of procedural advantages that benefit plaintiffs in the Eastern District.

ii. The Eastern District of Texas Provides Plaintiffs with a Variety of Procedural Advantages.

Given the plaintiff-friendly nature of many of the Eastern District of Texas' patent litigation procedures and local rules, it is unsurprising that it is the chosen forum for so many patent owners who are able to pick any district in the nation.

1. For example, Eastern District's judges are anomalously hostile to summary judgment. *See, e.g.*, Klerman & Reilly, *supra*, at 252 tbl.2. (noting that from 2000 to 2015, the Eastern District of Texas resolved only 0.8% of its cases at summary judgment, which is half the rate of the next lowest district and less than a quarter of the national average of 3.7%); Love & Yoon, *supra*, at 18 (reporting that from 2014 to mid-2016, the Eastern District of Texas granted or partially granted 26.0% of summary judgment motions, far below the national average of 43.4%). This hostility is institutional. For example, from the time Judge Gilstrap took the bench in 2011 until mid-2016, he required patent litigants—and only patent litigants—to submit five-page letter briefs asking the court for permission before filing a motion for summary judgment. Ryan Davis, *Gilstrap Eases Filing of Patent Summary Judgment Motions*, Law360 (July 22, 2016, 7:15 PM), https://www.law360.com/articles/820536/gilstrap-eases-filing-of-patent-summary-judgment-motions. During this same period, the district's share of the

nation's patent cases shot up from 12% to 44%. *See* Klerman & Reilly, *supra*, at 249 tbl.1; Love & Yoon, *supra*, at 8 tbl.1.

The result of all this is that far more patent cases in the Eastern District of Texas (8.0%) go to trial than in the rest of the nation (2.8%). *See* Klerman & Reilly, *supra*, at 253 (citing Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 411-13 (2010)). Ultimately, this favors patentee plaintiffs because nationwide, patentees win 60% at the time at trial, but only 29% of the time at summary judgment. *Id.* at 251 (citing John R. Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1790 (2014)). In the Eastern District, the trial win rate for patentees is even higher: 72%. *Id.* at 254.

2. Similarly, judges of the Eastern District of Texas tend to be reluctant to invalidate asserted patents on the grounds of § 101 invalidity. *See, e.g.*, Brandon S. Bludau, Elliot C. Cook, & Darren M. Jiron, *Section 101 Metrics: Post-*Alice *District Court Rulings on Section 101 Motions*, Finnegan (Oct. 2015), http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=44911826-d236-453f-a813-0759f6f3887e ("For patentees seeking to thwart a Section 101 attack, the Eastern District of Texas is by far the most favorable jurisdiction."). This Court instituted a rigorous standard for 35 U.S.C. § 101's patent subject-matter eligibility requirements in the context of computer-based patents in *Alice Corp. Pty. v. CLS Bank International*, 134 S. Ct. 2347, 2352 (2014). In the wake of that landmark decision, § 101 motions to dismiss have become an important tool for defendants to combat abusive litigation involving the

assertion of bad, i.e. ineligible, patents. *See, e.g.*, Daniel Nazer, *Happy Birthday Alice: Two Years Busting Bad Software Patents*, Electronic Frontier Foundation (June 20, 2016), https://www.eff.org/deeplinks/2016/06/happy-birthday-alice-two-years-busting-bad-software-patents.

The Eastern District of Texas, however, grants very few motions to dismiss on § 101 grounds. *See* Edward Tulin & Leslie Demers, *A Look at Post-Alice Rule 12 Motions Over the Last 2 Years*, Law360 (Jan. 27, 2017, 12:55 PM), https://www.law360.com/delaware/articles/882111/a-look-at-post-alice-rule-12-motions-over-the-last-2-years (reporting that from 2015 to 2016, the Eastern District of Texas denied 55% of § 101 motions to dismiss, compared to 27% in the District of Delaware and 30% in the Central District of California). It is also less receptive to § 101 challenges at summary judgment. *See* Bludau, *supra* (reporting that from 2014 to 2015, the summary judgment success rate for § 101 challenges was below 35% in the Eastern District of Texas, far less than almost 90% in the District of Delaware and over 75% in the Central District of California). In other words, although the *Alice* Court provided patent defendants with a useful defensive tool to defend against bad patents in litigation, the Eastern District of Texas has effectively rendered this tool weak and blunt.

3. Patentees in the Eastern District of Texas also benefit from accelerated discovery schedules (part of what is often described as the "rocket docket"), disproportionately burdening defendants. *See, e.g.*, Jacqueline Bell, *Texas Rocket Docket Faces New Surge of Patent Suits*, Law360 (Sept. 28, 2015, 9:23

PM), https://www.law360.com/articles/707840/texas-rocket-docket-faces-new-surge-of-patent-suits.

By nature, discovery in patent cases is usually more burdensome to defendants than to plaintiffs because "the bulk of the relevant evidence usually comes from the accused infringer," *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009) (internal quotation marks omitted). This is especially true when the plaintiff is a PAE, as PAEs "do not have commercial products and tend to have less complex business operations." Klerman & Reilly, *supra*, at 268. Discovery costs also tend to be "the single largest expense in patent litigation" for defendants. Love & Yoon, *supra*, at 22http://www.aipla.org/learningcenter/library/books/econsurvey/2015EconomicSurvey/Pages/default.aspx).

A comparison of typical scheduling orders from individual judges with large patent dockets in the Eastern District of Texas and the District of Delaware reveals that the former have discovery deadlines that are as much as 50 to 170 days earlier than the latter. *Id.* at 21-22.

This combination of a low likelihood of disposing of a case at summary judgment and the front-loaded cost of discovery encourages defendants to settle, either because they cannot afford to keep litigating, or because settlement would simply be cheaper than continuing to litigate, even to an eventual win. Reflecting these pressures, from January 2014 to June 2016, the Eastern District saw more settlements, earlier in litigation, compared with the rest of the nation. *See id.* at 14 tbl.4.

4. The Eastern District of Texas also allows plaintiffs to choose a division and, with high

probability, a particular judge. Unlike most district courts, where cases are assigned to judges randomly, the Eastern District of Texas assigns them based on the division in which they were filed. This effectively allows plaintiffs to choose a division via a drop-down menu when filing on the court's website. Klerman & Reilly, *supra*, at 254-55. Each division, meanwhile, "specifies *ex ante* via a public order the allocation of cases filed in each division. For example, at the outset of the Eastern District's popularity in 2006, patentees filing in the Marshall division were told they had a 70% chance of being assigned to Judge Ward." *Id.* at 255 (citing U.S. Dist. Ct. E.D. Tex. General Order 06-13). "[O]ver the past decade, a patentee filing in the Eastern District of Texas knew it had at least a 50% (and often far closer to 100%) chance of having a particular judge." *Id.* In this way, patentees not only enjoy district-wide procedural advantages, but can also shop for judges who they think will best implement those advantages in their cases.

5. Moreover, it is difficult for defendants to avoid these procedural disadvantages because the Eastern District of Texas has long been hostile to motions of transfer. For example, from 2012 to 2013 the District of Delaware granted 73 out of 109 (67%) transfer motions, while the Eastern District of Texas granted 133 of 253 (53%). Robert L. Uriarte, *How to Get Out of Dodge: Winning Patent Venue Transfer Strategies and the Federal Circuit*, Orrick (Mar. 19, 2014), https://www.orrick.com/Insights/2014/03/How-to-Get-Out-Of-Dodge-Winning-Patent-Venue-Transfer-Strategies-and-the-Federal-Circuit (pointing out that this disparity exists even though the legal standard

is actually more favorable to transfer in the Eastern District than it is in Delaware).

The continuing inequities of these results are underscored by the fact that "the Federal Circuit has taken the extraordinary step of issuing a writ of mandamus ordering the Eastern District to transfer a patent case four times since 2014, something it has otherwise done just once during the same period across all cases litigated in the other ninety-three districts." Love & Yoon, *supra*, at 16. But worse, even when the Eastern District does grant transfer, it does so much later in the pretrial process than does the average federal district. *Id.* at 16-17 (reporting that it takes a median of 340 days to transfer in the Eastern District, compared to the national median of 232, or 137 in the Northern District of California). So by the time of the ruling on the transfer motion, defendants will already have absorbed enormous costs, assuming they have not settled already.

6. Finally, the plaintiff-friendly procedures of the Eastern District of Texas are reinforced by defendants' inability to challenge them. As one commentator has noted, the "Eastern District's use of procedural rules and discretion in procedural matters to attract cases is almost completely shielded from appellate review by the abuse of discretion standard of review applicable to most procedural decisions, the harmless error doctrine, and the final judgment rule." Klerman & Reilly, *supra*, at 250. Thus, it is very hard for defendants to avoid or thwart the substantial disadvantages posed to them by the idiosyncratic procedural system.

Given all of the above, it is wholly unsurprising that plaintiffs, especially PAEs, choose to exercise

their basically unlimited choice of districts by suing in the Eastern District of Texas.

iii. Patentee Plaintiffs Win More Often in the Eastern District of Texas.

Patent plaintiffs in the Eastern District also enjoy much higher success rates than those in other districts. From 1995 to 2014, patent holders succeeded in the Eastern District of Texas 55% of the time (with success defined as an instance "where a liability decision was made in favor of the patent holder"), far above the national average of 33%. *2015 Patent Litigation Study*, PricewaterhouseCoopers, 15, 23 (May 2015), https://www.pwc.com/us/en/forensic-services/publications/assets/2015-pwc-patent-litigation-study.pdf. Narrowing the results to non-practicing-entity (NPE) litigation (which likely approximates PAE litigation) shows similar disparities: NPE plaintiffs successfully assert their patents 49% of the time in the Eastern District, but only 26% of the time nationwide. *Id.* at 16.

A major component of the PAE model is to pressure defendants into settling. *See generally* William H.J. Hubbard, *Sinking Costs to Force or Deter Settlement*, 32 J.L. Econ. & Org. 545, 545 (2015) ("The notion [behind nuisance litigation] is that the prospect of expensive litigation drives the defendant to pay a settlement despite knowing that, were the case to go to trial, the defendant would probably or certainly win."). As would be expected, settlement statistics from the Eastern District of Texas reflect resounding success for PAEs, at the expense of defendants: 87.5% of patent cases settled in the Eastern District of Texas, higher than the national average of 77.0%. Love & Yoon, *supra*, at 14

tbl.4. Moreover, 81.5% of these settlements occurred within a year into litigation in the Eastern District, again higher than the national average of 70.0%. *Id.*

C. A Return to § 1400(b) for Patent Venue Would Reduce Forum Shopping and Forum Selling and Restore Appropriate Fairness and Convenience.

Restoring § 1400(b) as the sole and exclusive rule for patent venue would substantially correct the current anomalous distribution of patent cases in the United States. In a statistical survey of 500 random patent cases corresponding to 665 defendants, only 30% of cases surveyed would have been eligible to be filed in the district in where they were currently filed if § 1400(b) governed patent venue. Colleen Chien et al., *What Would Happen to Patent Cases if They Couldn't All Be Filed in Texas?*, Patently-O (Mar. 11, 2016), http://patentlyo.com/patent/2016/03/happen-patent-couldnt.html. With a return to § 1400(b), 70% of patent plaintiffs would be required to file their claims in a different jurisdiction. *Id.* 62% of those cases would be filed in a jurisdiction in which the plaintiff had never filed. *Id.*

Returning to the specific venue provisions of § 1400(b) would also go a long way in breaking the Eastern District of Texas' incongruous grip on patent claims. If the venue rules of § 1400(b) were applied, it is estimated that 33% of cases would still be filed in the District of Delaware. *Id.* Likewise, 21% of cases would find their way to the Northern District of California. *Id.* And of course, that distribution would make much more practical sense, given that Delaware is the state of choice for incorporating a firm, and Northern California is home to Silicon

Valley. Both of these districts represent places where many corporations "reside" for § 1400(b) purposes. The Eastern District of Texas, however, would see its share of all patent cases drop to a much more reasonable 11%. *Id.*

Most importantly, a return to the Congressionally crafted patent venue provisions of § 1400(b) would mean that small businesses and innovators would much more often be able to defend a patent suit near their home and avoid the added costs and burdens of being dragged into court across the country or in East Texas.

While fixing venue alone won't completely fix the PAE problem, it will reduce the incentive to craft plaintiff friendly procedural rules and lead to more balanced rules across districts. It will make the PAE business model less appealing, less efficient, and less remunerative. And it will make it more affordable and feasible for businesses accused of infringement to mount an appropriate defense without unduly inconveniencing plaintiffs with legitimate patent claims.

IV. The Federal Circuit's Erroneous Interpretation of § 1400(b) Especially Handicaps Small Businesses and Startups, Reduces Innovation and Harms the American Economy.

The Federal Circuit's rule disadvantages patent defendants generally, but this burden is particularly heavy for smaller, younger, and less experienced companies such as startups or smaller entrepreneurs who are critical contributors to job growth and the American economy. The harms caused by the Federal Circuit's erroneous rule include operational hurdles

for individual defendants as well as overall drops in research and development, venture capital funding, and job growth across the economy as a whole.

A. Small Businesses and Startups are the Main Job Creators and Source of Growth in the American Economy Today.

New companies and startups are responsible for the vast majority of net job creation in the United States. *See* Tim Kane, *The Importance of Startups in Job Creation and Job Destruction*, Ewing Marion Kauffman Foundation, 2 (July 2010) http://www.kauffman.org/~/media/kauffman_org/research%20reports%20and%20covers/2010/07/firm_formation_importance_of_startups.pdf (finding *all* net job growth attributable to new companies and startups); Jason Wiens, *The Importance of Young Firms for Economic Growth*, Ewing Marion Kauffman Foundation (Sept. 14, 2015), http://www.kauffman.org/~/media/kauffman_org/resources/2014/entrepreneurship%20policy%20digest/september%202014/entrepreneurship_policy_digest_september2014.pdf (finding that startups and new firms account for nearly all net job growth, and declining startup rates threaten growth). Moreover, high-growth businesses, which tend to be young, account for nearly 50% of gross jobs created. Ryan Decker et al., *The Role of Entrepreneurship in US Job Creation and Economic Dynamism*, 28 J. Econ. Persp. 3, 4 (2014). In 2010, businesses that were less than one year old created approximately 2.5 million new jobs. *Entrepreneurship and the U.S. Economy*, Bureau of Lab. Stat., https://www.bls.gov/bdm/entrepreneurship/

entrepreneurship.htm (last modified Apr. 28, 2016). In 2015, that number rose to 3 million. *Id.*

Startups play a critical role in U.S. employment. The birth of new firms "contribute[s] substantially to both gross and net job creation." John Haltiwanger et al., *Who Creates Jobs? Small Versus Large Versus Young*, 95 Rev. Econ. & Stat. 347, 347-48 (2013). Likewise, sluggish growth for startups is linked with sluggish growth for the U.S. economy. *See, e.g.*, Steve Matthews, *American Economy Hamstrung by Vanishing Startups, Innovation*, Bloomberg (June 1, 2016, 4:00 AM), https://www.bloomberg.com/news/articles/2016-06-01/record-low-for-u-s-startups-helps-spawn-productivity-slump; Jeffrey Sparshott, *Sputtering Startups Weigh on U.S. Economic Growth*, Wall Street J., http://www.wsj.com/articles/sputtering-startups-weigh-on-u-s-economic-growth-1477235874 (last updated Oct. 23, 2016, 11:20 AM).

B. The Consequences of PAE Litigation Are Particularly and Unduly Taxing for Small Businesses.

Small businesses and startups must often make extremely efficient use of their limited funds to keep their enterprises running or to successfully innovate until they bring their products or services to market. This increased pressure to be efficient makes small businesses and startups a prime target for litigious plaintiffs hoping for easy settlements. Furthermore, employee time lost to litigation disproportionately harms startups and small firms, whose operations can literally be stalled as a result of nuisance suits. Knowing that such harm can be irreparable to small and emerging businesses, PAEs are incentivized to target them relentlessly.

i. PAEs Disproportionately Target Small Businesses in the Hopes of an Easy Settlement.

Enabled by the Federal Circuit's extremely broad venue rule, PAEs selectively target small businesses and startups. Across PAE suits from 2005 to 2012, for example, at least 55% of unique defendants had revenues of $10 million or less per year. Colleen Chien, *Startups and Patent Trolls*, 17 Stan. Tech. L. Rev. 461, 464 (2014). In suits brought by operating companies, on the other hand, only 16% of unique defendants fell into that category. *Id.*

This is hardly surprising, given that the PAE business model thrives on the same opportunism that leads them to forum shop, target defendants who are tied up with simultaneous but unrelated suits, sue firms that have recently experienced an influx of cash, and engage in a variety of other calculated behaviors. *See* Lauren Cohen et al., *Patent Trolls: Evidence from Targeted Firms* 27-28 (Nat'l Bureau of Econ. Research, Working Paper No. 20322, 2016), http://www.utdallas.edu/~ugg041000/patentlitigation.pdf.

This also explains why PAEs tend to bring suits close to the dates of startups' initial public offerings; they take advantage of the fact that their targets are usually most vulnerable when they "have insufficient time, funds, and human capital to spend on a thoughtful examination of the claims." Robin Feldman & Evan Frondorf, *Patent Demands and Initial Public Offerings*, 19 Stan. Tech. L. Rev. 52, 88 (2015). A survey of 50 companies that issued IPOs from 2007 to 2012 showed that half received patent demands within a year following the IPO. *Id.* at 54-

55. Moreover, half (and two-thirds of surveyed information technology companies) reported spending over $250,000 to defend against these claims. *Id.*

ii. Small Businesses and Startups Have Neither Sufficient Time nor Sufficient Resources to Fight PAE Suits.

Because the PAE business model makes strategic sense and works effectively, it is all the more dangerous to small business, startups, and entrepreneurs. On average, defending a PAE suit in court costs $857,000, or 24% of a business's annual revenue, on average. Chien, *Startups*, *supra*, at 473 tbl.1. Settlements average $340,000, or 13% of revenue. *Id.* Even fighting out-of-court costs $168,000, or 5% of revenue. *Id.* As mentioned earlier, PAE suits with less than $1 million at stake can cost $500,000 to defend. Law Practice Mgmt. Comm., *supra*, at 38.

Direct, out-of-pocket costs are not the only harms that are suffered by small businesses, entrepreneurs, and startups who are hit with patent infringement suits. Forty percent of low-revenue or low-resource enterprises undergo significant operational impacts upon receiving demand letters from PAEs. *See* Chien, *Startups*, *supra*, at 465. These impacts include "delayed hiring or achievement of another milestone, change in the product, a pivot in business strategy, a shut-down of the business line or the entire business, and/or lost valuation." *Id.* Startups are especially vulnerable to demand letters because "no one wants to invest in a company where founder time and investor money is going to be bled to patent trolls." *Id.* at 474 (internal quotation marks omitted). Indeed, while larger firms have the infrastructure,

funds, personnel, resources, and time to fight PAE suits properly in court, smaller firms do not.

C. The Costs of Patent Litigation to Startups and Small Businesses Generally, and Particularly the Cost of PAE Litigation, Do Serious Harm to the American Economy.

Harm to startups causes harm to the economy overall. This occurs in at least three observable ways.

First, costs imposed by frivolous patent suits, both in litigation and in settlement, divert resources that could otherwise be used for research and development. As the FTC stated in a recent report, such costs "can divert technical talent and other corporate resources away from developing new products and engaging in research and development, a result that is socially wasteful and inconsistent with the fundamental goal of the patent system." Federal Trade Commission (FTC), *Patent Assertion Entity Activity* 25 (Oct. 2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

Even if it is difficult to tell exactly what innovations would have resulted from research and development funding that is diverted toward costly litigation, small losses add up over time, and the American economy is deprived of innovative technologies and services that it might otherwise have benefited from. And in any case, it is undeniable that research and development has more societal and economic utility than frivolous litigation.

Second, frivolous PAE litigation is negatively correlated with venture capital (VC) investment. *See* Stephen Kiebzak, Greg Rafert, & Catherine E. Tucker, *The Effect of Patent Litigation and Patent Assertion Entities on Entrepreneurial Activity*, 45 Res. Pol'y 218, 230 (2016). "VC investment in new innovations and startups over the past five years would likely have been $109 million higher than it would have been but-for excess patent litigation." *Id.* at 229. Moreover, VC investment generally "would have likely been $21.772 billion higher over the course of five years but-for litigation brought by frequent litigators." *Id.*

In a survey of venture capitalists by the National Venture Capital Association, 100% of respondents indicated that "if a company had an existing demand against it, they might refrain from investing." Robin Feldman, *Patent Demands & Startup Companies: The View from the Venture Capital Community*, 16 Yale J.L. & Tech. 236, 258 (2014). Roughly half indicated that an existing demand would be a major deterrent on its face. *Id.* at 243.

Third and finally, the worst result of such costs is job loss. In response to a survey of venture capitalists and firms that accepted venture capital funding, one company stated that it "spent millions of dollars defending against a lawsuit from 'patent trolls,' and [that] the company went under due to lack of funding." *Id.* at 272. Likewise, the small startup Ditto was forced to lay off four of its fifteen employee workforce after losing $3 to $4 million of its valuation after being forced to defend itself in litigation for nearly a year; the case was later dismissed. *See* Joe Mullin, *New Study Suggests Patent Trolls Really Are*

Killing Startups, Ars Technica, (June 11, 2014, 5:55 PM), https://arstechnica.com/tech-policy/2014/06/new-study-suggests-patent-trolls-really-are-killing-startups/.

Thus, the harm caused by PAE litigation goes beyond simply the cost of litigation; it undermines the whole economy, hitting it at some of its most vulnerable and vital points—small businesses and startups.

CONCLUSION

As the foregoing data and descriptions make clear, meritless patent litigation against startups saps resources from companies that would otherwise be innovating and creating jobs. Needlessly forcing defendants to endure the unfair, added expenses of patent lawsuits in faraway and often unfavorable forums increases the likelihood that innovation will be hampered, jobs will be lost, new products and services will not be developed or adopted, and the economy as a whole will suffer. This Court should reverse the Federal Circuit's unreasonable interpretation of the patent venue statute, restore the proper operation of § 1400(b), and thereby ensure that innovators and entrepreneurs are no longer subject to these unintended and unnecessary burdens.

Respectfully submitted,

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